This question does not arise to be answered, having regard to the answer to question (a).

In the result, the respondent will repay to the second appellant the sum of $108,800 paid by the second appellant to the respondent in conformity with the respondent's assessment of duty chargeable on the assignment; and the respondent will pay the appellants' costs of the motion.

Order accordingly.

Solicitors: *Arthur Loke & Partners.*

A MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. CHOU TAI CHUAN & ANOR.

[A.Cr.J. (K.C. Vohrah J.) November 21, 1987]

B [Kuala Lumpur – Federal Territory Criminal Appeals Nos. 50 & 51 of 1987]

Criminal Procedure – Bail – Forfeiture of bail bonds – Procedure to be followed – Whether bailors served with notices to produce accused.

C Chou Tai Chuan and Henry Ong Yip Chung were charged separately before a magistrate. Henry Ong pleaded guilty to one charge under the Passports Act 1966. Chou Tai Chuan pleaded guilty to two charges, one under the Passports Act 1966 and the other under the National Registration Regulations 1960. They were convicted and sentenced accordingly. Both appealed against their sentences of im-
D prisonment and were released on bail of $40,000 in two sureties each.

Both parties absconded and as a result the court had to deal with the estreatment of the bail bonds. In the case of Chou Tai Chuan, the bailors were David Siew and Quak May May. As for Henry Ong, the bailors were Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha.
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Held: (1) as for Quak May May, since she had no notice to produce the accused on the relevant date she could not be held responsible for her failure to so produce the accused. Therefore she need not show cause and was accordingly discharged;

F (2) since David Siew showed some measure of negligence, a fair amount of the penalty should be forfeited. $5,000 was accordingly forfeited;

(3) as for the case of Henry Ong, since the bailors had not been served notices to produce the accused on the relevant date, they were also discharged from showing cause.

Cases referred to:

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(1) *Khor Ewe Suan & Anor.* v. *Public Prosecutor* [1964] M.L.J. 220.
(2) *Tarni Yadav & Anor.* v. *State* [1962] 2 Cr. L.J. 627.
(3) *Pohap Singh Bharmasingh* v. *State* [1961] 1 Cr. L.J. 673.
H (4) *Fateh Chand Wadhumal* v. *Emperor* 41 Cr. L.J. 802

FORFEITURE OF BAIL BONDS.

Raus bin Shariff (Deputy Public Prosecutor) for the Public Prosecutor.

I *Mohamed Faidz bin Darus* for the respondents.

Cur. Adv. Vult.

K.C. Vohrah J.: Two persons, husband and wife, were charged separately before a magistrate.

The husband, Henry Ong Yip Chung, pleaded guilty to a charge under section 12(1) of the Passports Act 1966. His wife, Chou Tai Chuan, pleaded guilty to two charges, one under section 12(1) of the Passports Act 1966 and the other under regulation 24(1) of the National Registration Regulations 1960. On all charges, sentences of imprisonment were passed by the magistrate. Both appealed against their sentences of imprisonment and were released on bail of $40,000 in two sureties each.

The Public Prosecutor lodged cross-appeals against the sentences passed by the magistrate. The appeal and cross-appeal (F.T.C.A. 50/ 1987) against the sentences in respect of the wife, Chou, were scheduled for hearing on September 25, 1987. She did not turn up on the date. Encik Faidz, her counsel, informed the court that Chou might have absconded. He also informed the court that the appeal involving Chou's husband was coming up for hearing on September 28, 1987.

I indicated to the Deputy Public Prosecutor, Encik Tan Hock Chuan, and to Encik Faidz that the matter of the estreatment of the bail bond in respect of Chou would have to be considered.

On September 28, 1987, the appeal by Henry Ong and the cross-appeal by the Deputy Public Prosecutor (F.T.C.A. 51/1987) came up for hearing. Henry Ong failed to turn up.

The Deputy Public Prosecutor this time, Encik Zaini Abdul Rahman, intimated to the court that both Henry Ong and his wife, Chou, had absconded. He requested for an adjournment in respect of the estreatment of both bail bonds which had been executed allowing for their release pending the appeals. He said he needed to receive instructions from the police on the matter.

At the next date of hearing on October 10, 1987, the Deputy Public Prosecutor this time, Encik Tan Hock Chuan, stated that he needed time for the proceedings relating to the estreatment of the bonds. This was after I had sketched out the procedures which I expected to be adhered to in respect of the estreatment of the bonds under section 404 of the Criminal Procedure Code, bearing in mind Malaysian and Indian authorities on the matter.

In *Khor Ewe Suan & Anor.* v. *Public Prosecutor*[1] Hepworth J. established guidelines for the procedure for the forfeiture of a bail bond under section 404(1) of the Criminal Procedure Code. Hepworth J. quoted with approval certain passages in *Mallal's Criminal Procedure,* 4th Ed., where comparable provisions of section 416 of the Singapore Criminal Procedure Code were considered. Hepworth J. had this to say on the procedure at p. 221:

> "... It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the actual persons who entered into the bond. They should be given opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should be invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required ..."

I would add that the fact of the accused being absent on the date of hearing would be apparent to the court before which the hearing was supposed to have been heard as this would have been observed by the court and no independent evidence is necessary to prove such absence (see *Tarni Yadav & Anor.* v. *State*[2] and *Pohap Singh Bharmasingh* v. *State,*[3] Indian authorities on section 514 of the Indian Criminal Procedure Code which substantially corresponds with section 404 of the Malaysian Criminal Procedure Code). My record of the fact of absence of the accused on the dated fixed for the hearing of the appeal and cross-appeal is sufficient.

And it must of course be shown that since the date of the hearing of the appeal was not known to the accused or to the bailor, it not having been fixed in the bail bond itself, notice thereof had to be sent to the bailor to produce the accused on the scheduled date (see *Fateh Chand Wadhumal* v. *Emperor*[4]).

After the taking of evidence and the court is satisfied that the bond has been forfeited, the surety may be called to show cause why the penalty should not be levied. And the surety would be invited to the witness box and state his case, if he so wishes, calling any further evidence if required (see *Khor Ewe Suan & Anor.* v. *Public Prosecutor.*[1] at p. 222).

I indicated to the Deputy Public Prosecutor that since there were two bonds with two bailors each, separate proceedings would have to be considered in respect of the forfeiture of each bail bond.

At the next hearing of the matters on October 31, 1987, the Deputy Public Prosecutor,

Encik Zaini, informed the court that the prosecution could not go on with the proceedings as the police personnel who served the notices to the bailors were not present; and the hearing was adjourned to November 5, 1987.

On this re-scheduled date, the Deputy Public Prosecutor, Encik Raus Mohd. Shariff, conducted the forfeiture proceedings in respect of each bond separately. And I shall, in this judgment, deal first with the proceedings in respect of the appellant Chou Tai Chuan in F.T.C.A. 50/1987 and then with the proceedings in respect of Henry Ong Yip Chung in F.T.C.A. 51/1987.

F.T.C.A. 50/1987

The bailors in respect of the bond executed for the release of Chou Tai Chuan were present at the inquiry. They were David Siew and Quak May May and they heard the evidence that was adduced.

The magistrate who convicted and sentenced Chou Tai Chuan gave evidence that she allowed stay of execution on the sentences pending appeal. She released the accused on her and the two sureties, David Siew and Quak May May, executing a bond for $40,000 on March 6, 1987. She said that in the course of the hearing of the case she impounded the accused's certificate of identity.

While the surety David Siew had notice of the date of hearing of the appeal and this his counsel conceded, Quak May May, according to the Deputy Public Prosecutor was not served with the notice. I requested David Siew to show cause why the penalty should not be levied.

As far as Quak May May was concerned, since she had no notice to produce the accused on the relevant date she could not held responsible for failure to so produce the accused. She therefore did not have to show cause why penalty had to be levied against her. And I accordingly discharged her from having to show cause.

As for David Siew it was in evidence, and this the Deputy Public Prosecutor conceded, that he had for the most part acted responsibly, having taken steps to put Chou, who is the wife of Henry Ong the uncle of Siew's wife, into Shangrila Hotel and checking on them every day by communicating with them over the phone and at lunches or dinners from the day they went to the hotel on March 3, 1987 to April 3, 1987. But he said that on April 3, 1987 over dinner Chou told him that she and her husband would like to go for a tour of the other parts of West Malaysia since they had nothing much to do. The next day, he could not get in touch with them and on April 7 & 8 he then informed the counsel of their absence and on April 10, 1987 he lodged a police report. A week later, he reported the matter to the magistrate who originally granted bail to the accused. He said that a normal tour would take three to seven days. He stated at the back of his mind he thought they had gone on a tour and since they had his telephone number he expected them to call him. He kept calling the hotel and then he reported the matter to his counsel.

But as the Deputy Public Prosecutor argued, he should have asked Chou which tour they were going on knowing full well he had to produce the accused in court when called to do so by the court.

No doubt Siew was lulled into a false sense of security that Chou could not go out of the country since her travel document had been impounded by the court. It is clear that he did take steps before April 4, 1987 to inform and assure himself about her whereabouts. But on April 3, 1987 when Chou told him about the tour, he should have warned Chou and her husband against going on the tour or at least have kept himself informed of their itinerary, the name of the tour operator, or the duration of the tour and when they intended to leave on the tour. The least he could have done was to ask them how he could get in touch with them. To my mind, he failed to take sufficient steps to make sure that Chou would not abscond when he was aware that she and her husband intended going on a tour. While he acted responsibly for a greater part, this lapse, while not wholly negligent, was nevertheless conduct which I could not ignore showing some measure of negligence. I considered that a fair amount of the amount of penalty to be forfeited should be $5,000 and I accordingly forfeited $5,000.

F.T.C.A. 51/1987

The bailors who stood surety for the release of Henry Ong Yip Chung, Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha, were present during the proceedings.

The evidence of the magistrate in this matter was that she sentenced Henry Yip to a term of imprisonment for an offence under section 12(1)(k) of the Passports Act 1966. Upon application of

defence counsel, she stayed execution of the sentence pending appeal. Bail of $40,000 in two sureties was allowed and the bail bond was duly executed on March 6, 1987. The bailors were Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha.

But the evidence was clear that the police process servers had not served notices on them to produce the accused for the scheduled date of the hearing at the High Court; they had served on two other persons instead.

To my mind, no proof had been shown that the bond has been forfeited. The Deputy Public Prosecutor conceded that they should be discharged. And I accordingly discharged them from having to show cause.

Order accordingly.

Solicitors: *A. Malik & Lawrence Tan.*

CHEE LUI TEEN v. KIET HOE DEVELOPMENT SDN. BHD.

[O.C.J. (Lim Beng Choon J.) November 21, 1987]

[Alor Setar – Civil Suit No. 141 of 1982]

Land Law – Agreement to transfer land – Increase in area – Rectification of agreement – Application for – Compensation sought – Principles on rectification – Whether rectification an appropriate remedy.

The defendant company wanted to develop certain lands including two lots on which the plaintiff had erected certain buildings. In order to acquire vacant possession of the said lands, the defendant company decided to transfer another land (Lot 36) to the plaintiff. The latter undertaking was embodied in a written agreement. Thereafter, due to certain governmental planning, the area of Lot 36 was increased considerably. The defendant company therefore sought compensation for the increased land from the plaintiff which the plaintiff refused to give. The defendant company filed a counterclaim seeking rectification of the agreement or alternatively compensation for the increased land.

Held, dismissing the counterclaim: (1) the principles advocated in the cases cited clearly show that a court should be cautious in allowing a rectification of any written instrument. It is not the function of the court to re-write an agreement which the parties had entered into nor should it allow a party who subsequently found that the terms of the agreement were unfavourable to him, and to avoid performance, sought the assistance of the court to rectify it under the guise that the agreement did not reflect the common intention of the parties;

(2) there was no mistake whatsoever in the making of the agreement. It fully contained what had been agreed by both parties prior to the signing of the agreement;

(3) rectification is certainly not the proper remedy in cases of this nature.

Cases referred to:

(1) *Siddique & Co.* v. *Utoomal & Assudamal & Co.* A.I.R. 1946 P.C. 42.
(2) *May* v. *Platt* [1900] 1 Ch. 616.
(3) *Frederick E. Rose* v. *William H. Pim* [1953] 2 Q.B. 450.
(4) *Oh Hiam & Ors.* v. *Tham Kong* [1967] 1 M.L.J. 65.
(5) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.
(6) *Yuson Bien & Anor.* v. *Bankers Trust Co. Ltd.* [1980] 1 M.L.J. 32.

CIVIL SUIT.

George John for the plaintiff.
S. Visvanathan for the defendant.

Cur. Adv. Vult.

Lim Beng Choon J.: This action has a rather chequered history. However, for the purpose of this judgment I do not think it is necessary for me to set out the events that took place prior to the hearing of the case before me on June 22, 1986. Suffice it to say that originally Chee Lui Teen, who was the plaintiff in Civil Suit No. 141 of 1982, sued Kiet Hoe Development Sdn. Bhd. as defendant, and in this suit the plaintiff prayed for an order of specific performance in respect of an agreement in which the defendant company had agreed to transfer the plaintiff without payment of money, the land comprised in Lot 36 now held under title HS(M) 477/1981 Mukim Alor Malai, Kedah. The action by the plaintiff was, however, settled before the trial of this case. It follows therefore that the only remaining part of the action is the counterclaim made by the defendant company (hereinafter referred to as the company) and the defence to the counterclaim by the plaintiff (hereinafter referred to as the defendant to the counterclaim).

Briefly the facts are as follows. The company intended to develop their land comprising several lots inclusive of Lots 28 and 30 in the Mukim Alor Malai, District of Kota Star, into a housing estate. At that time, the defendant to the counterclaim had erected a house and a shrine on the two Lots 28 and 30 apparently with the consent of the company or their predecessor. In order to acquire vacant possession of these two lots to